(9)

Supreme Court, U.S.
FILED
SEP - 7 2000
CLERK

No. 99-7504

In The

Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

MARK V. MEIERHENRY*
CLINT SARGENT
DANFORTH, MEIERHENRY
& MEIERHENRY, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075
Counsel for Petitioner

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Argument 1

1. THE LEGISLATIVE INTENT SURROUNDING 18 U.S.C. § 3621(e)(2)(B) IS INCONSISTENT WITH THE BOP'S POSITION OF UNFETTERED DISCRETION IN ADMINISTERING THE EARLY RELEASE PROGRAM 1

2. THE FUNDAMENTAL PRINCIPLES OF INDIVIDUAL LIBERTY AND FREEDOM FROM INCARCERATION DICTATE THAT THE EXISTENCE OF DISCRETION REQUIRES ITS EXERCISE 6

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) 6

Anderson v. Yungkau, 329 U.S. 482 (1947) 3

Dorszynski v. United States, 418 U.S. 424 (1973) 6, 7

Federal Power Comm'n v. Texaco, 377 U.S. 33 (1964) 6

INS v. Yang, 519 U.S. 26 (1996)..... 6

Stack v. Boyle, 342 U.S. 1 (1951) 6, 7

U.S. v. Rodgers, 461 U.S. 677 (1983) 2

United States ex rel. Siegel v. Thoman, 156 U.S. 353 (1895) 3

STATUTES AND REGULATIONS

18 U.S.C. § 3621..... *passim*

OTHER AUTHORITIES

H.R. Rep. No. 320, 103rd Cong., 1st Sess. (1993) 3

ARGUMENT

Petitioner Lopez asserts that the BOP has violated the plain language of 18 U.S.C. § 3621 by categorically denying Mr. Lopez consideration for early release. The BOP's position is that Congress's use of the word "may" in Section 3621(e)(2)(B) grants the BOP unfettered discretion to determine which inmates, if any, are eligible for early release after successful completion of the drug treatment program. According to the BOP, the Director has been granted the authority by Congress to exclude any, and all, prisoners from the early release program.

The BOP's construction of the word "may" is flawed for at least two reasons: (1) Such a construction is contrary to the structure, purpose and legislative intent of Section 3621(e)(2)(B); and, (2) Such a conclusion runs counter to the fundamental principles of individual liberty and freedom from incarceration.

1. The Legislative Intent Surrounding 18 U.S.C. § 3621(e)(2)(B) Is Inconsistent With The BOP's Position Of Unfettered Discretion In Administering The Early Release Program.

Congress used the word "may" in Subsection (e)(2)(B) rather than "shall" because it did not want to create a right to early release for prisoners. Congress was well aware that had it used the word "shall," it would have been creating a mandatory provision, thereby requiring the BOP to grant early release to every single prisoner that completed the drug treatment program (excluding those convicted of a violent offense, of course). Petitioner Lopez does not argue that this was

Congress's intent. Congress's intent was that every prisoner convicted of a nonviolent offense who completed the drug treatment program would be eligible *for consideration* for early release.

The BOP cites this Court's decision in *U.S. v. Rodgers*, 461 U.S. 677 (1983), as support for its argument that 18 U.S.C. § 3621(e)(2)(B) grants the BOP total discretion to administer Congress's early release program. Lopez submits that the rule of construction stated in *Rodgers* supports the opposite reading of Section 3621(e)(2)(B).

This Court stated that the word "may", when used in a statute, usually implies some degree of discretion. *Rodgers*, 461 U.S. at 706. "This common sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *Id.* The word "may" does not always imply that an entity granted the permission to act has the authority to act in any manner it so chooses. The entity's conduct must not conflict with the legislative intent or the purpose of the statute.

The legislative intent and purpose of Section 3621(e)(2)(B) is fighting crime and reducing criminal recidivism by providing drug treatment to as many federal prisoners as possible. This goal is accomplished by providing incentives to participate in drug treatment. Congress's goal is not accomplished by establishing administrative barriers to the program's incentives.

There are many clear indications of Congress's intent in establishing the early release program. The legislative history is replete with Congressional demands for

increased participation in the drug treatment program. See Pet. Op. Br. at 8-14, 24-32. The BOP ignores that part of Congress's work which reviewed the performance of drug rehabilitation in federal prisons and found the performance unsatisfactory.[1]

Congress made clear that simply offering drug treatment to prisoners was not enough. Providing incentives for participation was, in Congress's judgment, the difference between a successful drug treatment program and an unsuccessful program. See H.R. Rep. No. 320 at 4. The BOP argues that legislation intended to increase participation in the program was actually a grant of authority to the BOP to set up barriers to participation as the BOP sees fit. The BOP's argument cannot be reconciled with the clear purpose of § 3621(e)(2)(B).

The structure of the statutory language indicates that Congress' use of the word "may" in Subsection (e)(2)(B) was a grant of permission to act in accordance with Congress' drug and crime-fighting plan. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 360 (1895) (use of the word "may" indicates a grant of permission).

Congress used "shall" in Section 3621(b) to order the BOP to provide drug treatment for all prisoners. Congress used "in the judgment of the Director of the Bureau of Prisons" and "as the Bureau deems appropriate" in

---

[1] "There is an immense gap between what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons." H.R. Rep. No. 320, 103rd Cong., 1st Sess. at 2-3 (1993).

Subsection (e)(2)(A) to grant the BOP broad discretion to determine successful completion of the program and to establish conditions of confinement. Congress used "may" in Subsection (e)(2)(B) to grant the BOP permission to deviate from the mandate in Subsection 3621(a) that requires the BOP to hold prisoners for the full term of their sentence, not to deny eligible prisoners any consideration whatsoever. The structure of the statute demonstrates Congress drafting three separate terms/phrases to express three different intentions to the BOP.

Congress set up clear categories of inmates that would be eligible for consideration for early release based on their pre-conviction conduct, to wit, "prisoners convicted of non-violent offenses." Congress did not establish any guidelines for eligibility based on post-conviction conduct. Congress could quite adequately deny eligibility to certain categories of inmates based on pre-conviction conduct, and did so by excluding inmates convicted of violent offenses. What Congress was not equipped to do was to create categories or guidelines for ineligibility based on post-conviction conduct. It is this post-conviction conduct that compelled Congress to use permissive rather than mandatory language in its drafting of the early release provision.

By use of the word "may," Congress gave the BOP permission to consider post-conviction conduct in deciding who should receive a sentence reduction. Congress had already established the guidelines and categories of inmates that were eligible for consideration based on pre-conviction conduct. The discretion that Congress granted the BOP was not to create further excluded categories of pre-conviction conduct, but rather the discretion to look

at the prisoner's post-conviction incarceration conduct to determine whether a sentence reduction should be granted. It is illogical to think that Congress would impliedly grant the BOP the authority to create additional categories of pre-conviction behavior that automatically remove a prisoner from consideration for early release, when Congress specifically created its own category of pre-conviction conduct that would deny eligibility. If Congress wanted other pre-conviction conduct to categorically prohibit a prisoner from the incentive, it would have written the prohibitions in the statute. Congress used the permissive word "may" to allow the BOP the discretion to deny early release to those inmates that are statutorily eligible, but who do not deserve early release based on their conduct while in prison.

The BOP has arrogated to itself a far greater discretion than Congress intended: the authority to categorically exclude persons Congress categorically included. The current regulation and program statement governing the early release program do not conform to the legislative intent surrounding Section 3621(e)(2)(B) because the BOP is not considering all prisoners that are eligible for the early release incentive. The BOP has declared that a smaller number than Congress directed shall be given consideration for early release. This is clearly in conflict with the purpose of the Act. Congress directed that only one class of prisoner be excluded by limiting eligibility for consideration to those convicted on non-violent offenses.

2. The Fundamental Principles Of Individual Liberty And Freedom From Incarceration Dictate That The Existence Of Discretion Requires Its Exercise.

A categorical exclusion from eligibility of certain inmates is not an exercise of discretion at all. The BOP claims that it has unfettered discretion to determine which inmates shall be eligible. However, it is not exercising any discretion by categorically excluding all inmates within a certain class or category from eligibility for early release.

When addressing a person's liberty, the existence of discretion requires its exercise. See *Dorszynski v. United States*, 418 U.S. 424 (1973) (holding that existence of discretion in youth offender statutes requires its exercise); *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951) (holding that fixed bail amounts violated "statutory and constitutional standards" requiring an exercise of discretion).

The BOP has not exercised any discretion in Mr. Lopez's case. It has placed him in a category that denies him any consideration for early release. Decisions made by reference to predetermined categories are not based on discretion and are not consistent with the principles this Court laid down in *Dorszynski* and *Stack*.

The BOP cites *INS v. Yang*, 519 U.S. 26 (1996), *Federal Power Comm'n v. Texaco*, 377 U.S. 33 (1964), *American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991), and several others in support of its position that it is entitled to make categorical exclusions based on its unfettered discretion granted by Congress. Each case cited, and each exercise of agency discretion (or lack thereof), is related to a civil issue, not

criminal. Not one case addressed the issue of discretion to determine appropriate incarceration or discretion to limit a person's liberty. This distinction is paramount. *Dorszynski* and *Stack* illustrate the level of consideration required by a person or body charged with the discretionary authority to incarcerate another or limit another's liberty.

Different standards or rules are not uncommon in this country's justice system when a person's liberty is at stake. The distinction between decisions that affect an individual's freedom and an individual's monetary or civil interests are common. This nation takes great care in protecting a person's right to be free from incarceration. A person defending his individual liberty must be proven guilty beyond a reasonable doubt, while a person defending his pocketbook need only be proven to have wronged another by a preponderance of the evidence. In criminal cases, a person may not be compelled to testify against himself and his refusal to testify may not be used to infer guilt. The same is not true in civil cases. When statutory construction is an issue, the rule of lenity provides that any statutory ambiguities will be resolved in favor of the criminal defendant. The same is not true in other types of cases.

This country's justice system places a person's individual liberty above all else. The utmost care is required when a determination affecting a person's freedom is decided. Procedures that may be permissible in other types of actions are forbidden when a person's liberty is at stake. The case law cited above illustrates other factual scenarios where a person entrusted with the duty of exercising discretion in determining a person's liberty

chose to create categorical exclusions or rules instead of giving each situation individual analysis. Such categorical exclusions were struck down as abuses of discretion for failing to exercise individualized discretion. A similar result is required here.

This Honorable Court has been presented two different interpretations of 18 U.S.C. § 3621(e)(2)(B) by the respective parties.

Under the BOP's interpretation of the statute, Congress has granted the BOP unfettered discretion in administering the early release program. The statute states that all inmates convicted of violent offenses are excluded. In addition, the Director of the BOP may set up whichever additional categories of prisoners which she feels do not warrant consideration for eligibility for the program. The Director has decided that anyone that received a sentence enhancement for possession of a weapon is categorically ineligible. Under the BOP's theory, the Director could have categorically excluded anyone convicted of a drug offense or, for that matter, anyone convicted of any felony.

Under Lopez's interpretation of the statute, Congress gave the BOP permission to grant sentence reductions as an incentive for successful completion of drug treatment. Congress limited consideration for eligibility for early release to those prisoners whose pre-conviction conduct did not include a violent offense. Congress did not create a right to a sentence reduction to those who had qualifying pre-conviction conduct. Congress left it to the BOP to

individually decide whether those prisoners with qualifying pre-conviction conduct deserved a sentence reduction based on their post-conviction conduct.

The plain language of the statute, the structure and purpose of the statute, the legislative intent surrounding the statute's enactment and the fundamental principles of liberty support Lopez's interpretation of 18 U.S.C. § 3621(e)(2)(B).

CONCLUSION

Petitioner Lopez respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit Court of Appeals and order the Bureau of Prisons to consider Mr. Lopez for a sentence reduction in accordance with the Memorandum Opinion and Order of the District Court.

Dated this 7th day of September, 2000.

Respectfully submitted,

MARK V. MEIERHENRY
CLINT SARGENT
DANFORTH, MEIERHENRY & MEIERHENRY
315 South Phillips Avenue
Sioux Falls, SD 57104-6318
(605) 336-3075

Counsel for Petitioner